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No. 91-1735

In the Supreme Court of the United States

OCTOBER TERM, 1991

W. M. SCHEERER, PETITIONER

v.

ROSE STATE COLLEGE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DONALD R. LIVINGSTON
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

LAMONT N. WHITE
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

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QUESTION PRESENTED

Whether a Title VII claimant has a cause of action against the Equal Employment Opportunity Commission based on its allegedly improper processing of an employment discrimination charge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 950 F.2d 661. The order of the district court (Pet. App. B) granting summary judgment in favor of respondent Rose State College is reported at 774 F. Supp. 620. The orders of the district court dismissing the action as to respondent Equal Employment Opportunity Commission (Pet. App. C18-C19) and as to respondents Donald Burris and Evan Kemp are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1991. The petition for a writ of certiorari was filed on March 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 26, 1986, petitioner filed a charge with the Oklahoma City Area Office of the Equal Employment Opportunity Commission (EEOC), alleging that Rose State College had failed to hire her for the position of Director/Instructor of the Nurse Sciences Program because of her race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*. Although petitioner's charge was initially dismissed as untimely, the charge was reopened by the EEOC's Dallas District Office in August 1989. Pet. App. B7-B8; Gov't C.A Br. 3.

On September 18, 1989, Donald Burris, the director of EEOC's Oklahoma City Area Office, advised petitioner that, based on his review of the file, he did not believe that Rose State College had discriminated against her because of her race. Burris also advised petitioner that she could submit additional information to support her charge within ten days. Petitioner did not submit any additional information. Pet. App. B8; Pet. C.A. Br. App. 15a.

On September 24, 1989, Burris sent petitioner a letter of determination stating that there was no reasonable cause to believe that she had been discriminated against because of her race. Pet. App. B9. The letter advised petitioner that she could request review of that determination by the EEOC's Determinations Review Program (DRP) in Washington, D.C. The letter stated that any request for review by DRP had to be postmarked no later than October 13, 1989. *Ibid.* The letter further stated that, if petitioner did not submit a timely request for review by DRP, the determination set forth in the letter would become final, and petitioner would have to file a civil action no later than January 12, 1990, to preserve her Title VII rights. *Id.* at B10.

On October 27, 1989, DRP received a copy of Burris's letter of September 18, 1989, with an undated response by

petitioner typed at the bottom. Pet. App. B10. By letter dated January 5, 1990, DRP advised petitioner that her request for review was untimely and that she had to file a civil action by January 12, 1990, to preserve her Title VII rights. *Id.* at B11.

2. Petitioner, proceeding pro se, filed the present action on January 17, 1990, naming Rose State College and Donald Burris as defendants. The complaint alleged that the College had refused to employ her because of her race, and that EEOC had improperly processed her discrimination charge. Pet. App. A2. The EEOC filed a motion to dismiss the complaint on March 19, 1990. *Id.* at C18-C19. On April 25, 1990, petitioner, now represented by counsel, filed an amended complaint adding EEOC and its Chairman, Evan J. Kemp, as defendants. *Id.* at C19; Gov't C.A. Br. 2. On May 11, 1990, EEOC filed a response to the amended complaint which incorporated by reference the agency's earlier motion to dismiss. Pet. App. A3 n.2.

On June 15, 1990, the district court issued an order granting EEOC's motion to dismiss based on petitioner's failure to respond to the motion. Pet. App. C18-C19. On November 6, 1990, the district court dismissed the claims against Kemp and Burris. See *id.* at A2. Finally, on April 5, 1991, the court granted summary judgment in favor of Rose State College. *Id.* at B1-B18.

3. The court of appeals affirmed the district court's orders dismissing petitioner's claims against EEOC and the individual EEOC defendants and granting summary judgment in favor of Rose State College. Pet. App. A1-A12. The court of appeals initially expressed doubt whether petitioner's claims against EEOC and its officials were properly dismissed based solely on petitioner's failure to respond to EEOC's motion to dismiss those claims. *Id.* at A3. The court found it unnecessary to decide that issue, however, because it determined that

dismissal of the claims was proper in light of "the substantive legal basis asserted in EEOC's motion." *Id.* at A4. With respect to petitioner's claims against the agency, the court observed that "[t]he circuits which have addressed the issue have uniformly held that no cause of action against the EEOC exists for challenges to its processing of a claim." *Ibid.* (internal quotation marks omitted) (citations omitted). The court adopted that "established line of authority," holding that petitioner had failed to state a cause of action against EEOC. *Id.* at A4-A5. The court also held that petitioner had failed to state a cause of action against the individual EEOC defendants because she had not alleged "direct personal involvement on the part of [those defendants]." *Id.* at A5.[1]

ARGUMENT

Petitioner renews her contention (Pet. 5-8, 13, 19-24) that EEOC improperly processed her Title VII charge.[2] As the court of appeals correctly held, however, that contention does not state a cause of action upon which relief can be granted. Pet. App. A4-A5. Further review is therefore not warranted.

Every other court to consider the issue has likewise held that no cause of action will lie against EEOC based

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[1] With respect to petitioner's claims against Rose State College, the court of appeals affirmed the district court's rulings that petitioner "wholly failed to substantiate" her claims under 20 U.S.C. 1681 and 1682 (relating to discrimination in federally funded programs), and that petitioner's claims under 42 U.S.C. 1981 and 1982 and Title VII were time-barred. Pet. App. A6-A12.

[2] Petitioner does not challenge the court of appeals' holding (Pet. App. A5-A6) that her claims against the individual EEOC defendants were properly dismissed. In any event, here as in the courts below, petitioner's allegations of improper processing "attribute such conduct to the agency itself, without elaboration." *Id.* at A5.

on its allegedly improper processing of a Title VII charge. *McCottrell* v. *EEOC*, 726 F.2d 350, 351-352 (7th Cir. 1984); *Ward* v. *EEOC*, 719 F.2d 311, 313 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984); *Stewart* v. *EEOC*, 611 F.2d 679, 681-682 (7th Cir. 1979); *Francis-Sobel* v. *University of Maine*, 597 F.2d 15, 18 (1st Cir.), cert. denied, 444 U.S. 949 (1979); *Georator Corp.* v. *EEOC*, 592 F.2d 765, 768 (4th Cir. 1979); *Archie* v. *Chicago Truck Drivers*, 585 F.2d 210, 221-222 (7th Cir. 1978); *Gibson* v. *Missouri Pac. R.R.*, 579 F.2d 890, 891 (5th Cir. 1978), cert. denied, 440 U.S. 921 (1979); *Peavey* v. *Polytechnic Inst.*, 749 F. Supp. 58, 58-59 (E.D.N.Y. 1990), aff'd mem., 940 F.2d 648 (2d Cir. 1991) (Table); *Young* v. *Sullivan*, 733 F. Supp. 131 (D.D.C. 1990), aff'd mem., 946 F.2d 1568 (D.C. Cir. 1991) (Table), cert. denied, 112 S. Ct. 1291 (1992); *Hall* v. *EEOC*, 456 F. Supp. 695 (N.D. Cal. 1978).

These courts have recognized that "[t]he only 'right' [Title VII] establishes is the right to be free of discrimination." *Hall*, 456 F. Supp. at 700. When a Title VII plaintiff believes that EEOC has failed to vindicate that right, the remedy is to bring a civil action directly against the employer. "Implying a cause of action against the EEOC [would contradict] this policy of individual enforcement * * * and could dissipate the limited resources of the Commission in fruitless litigation with charging parties." *Ward*, 719 F.2d at 313. Thus, petitioner's claim of improper processing by EEOC was properly dismissed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DONALD R. LIVINGSTON
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

LAMONT N. WHITE
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